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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BELL ATLANTIC CORPORATION,
Petitioner,
v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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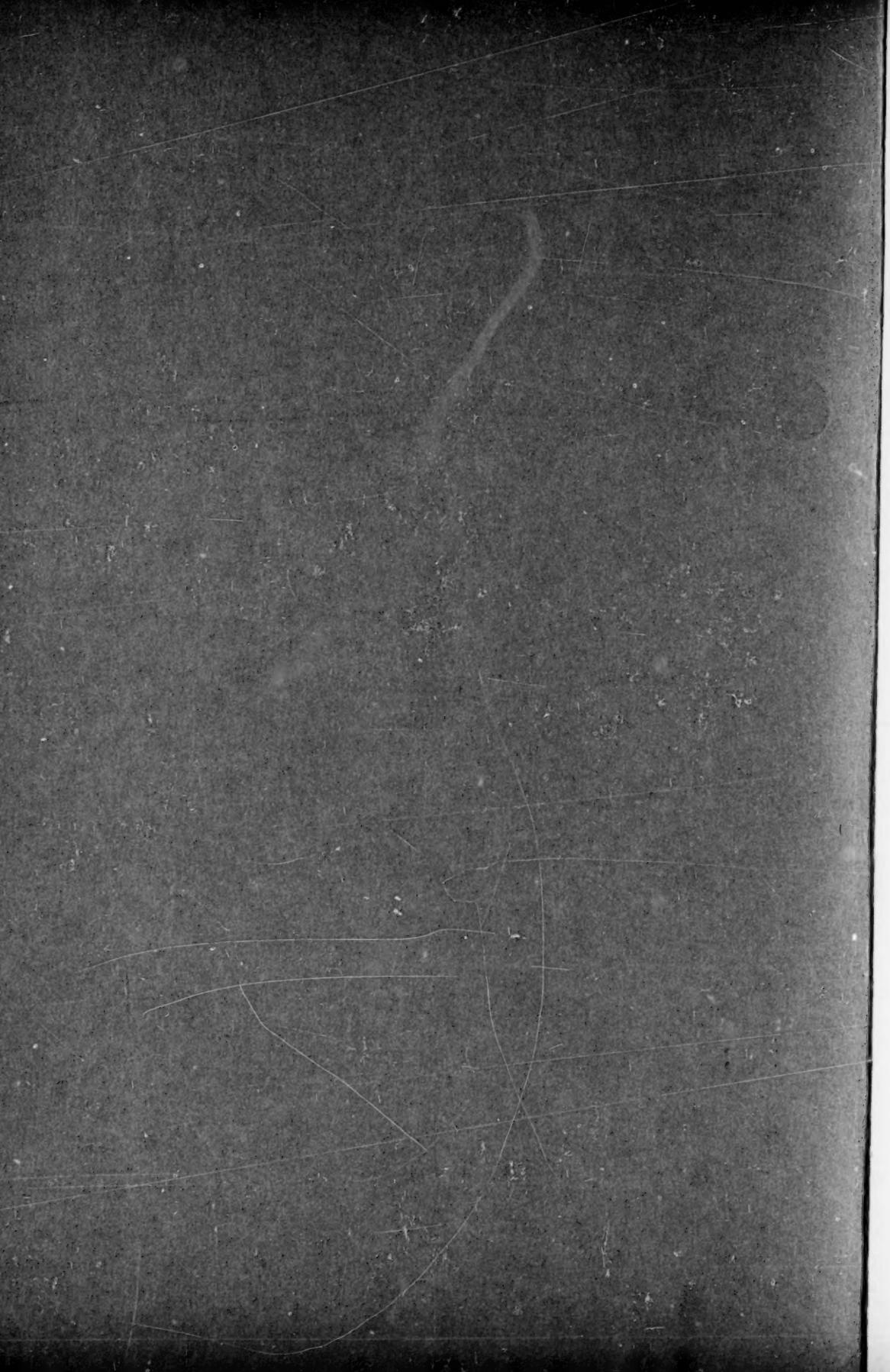


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As respondents' briefs confirm, no coherent principle rooted in the text of the consent decree can reconcile the district court's disparate interpretations of "for hire." Though respondents pay lip service to *Armour's* "four corners" rule, they ultimately rest their defense of the result below on the same non-textual policy considerations that animated the lower courts' decisions.

A. Nothing in the Text of the Decree Bars a Bell Company's Use of Long-Distance Service To Communicate With Its Own Customers

The United States correctly acknowledges that the words of a consent decree must be given a "common-sense" interpretation consistent with their "natural" and "normal" meaning. US Br. 7, 8. But its construction of "for hire" fails that standard. A company that communicates with its customers over long-distance lines does not, in any ordinary sense of the phrase, thereby offer long-distance service "for hire," even if, as one would expect, the company recovers its long-distance costs in the overall price for its goods or services. The company is no more a seller of long-distance services in such circumstances than it is a seller of any other component of its overhead, such as electric power, office space, or clerical services.

The United States apparently recognizes that its reading of "for hire" would make little sense in the case of an ordinary business. US Br. 9 n.7. The United States asserts, however, that the phrase should be given a special meaning in the case of a telecommunications business (thereby contradicting the concession that the phrase should be construed in its "normal" sense). According to the United States, a company like Bell Atlantic offers prohibited long-distance service "for hire" if long-distance communication is "a major and essential component" of the company's overall service and if "the charge for the total service varies with the duration" of the connection. US Br. 8.

But this attempt to rationalize the lower courts' "pragmatic" rewriting of the decree has no anchor in the text. The meaning of "for hire" is not a mystery. In *Red Ball*, the Court held that a livestock producer does not "engage in any for-hire transportation business" by using trucks to deliver its own livestock and then to

backhaul sugar (*see Pet.* 15-16). Bell Atlantic likewise provides no prohibited interexchange service "for hire" by using long-distance facilities to deliver its own gateway information.¹

AT&T argues that a natural interpretation of "for hire" would lead to a "wholesale subversion" of the decree's interexchange services prohibition. AT&T Br. 2.² This Court's response to a similar assertion in *Armour* applies with equal vigor here:

¹ The United States' reading of "for hire" does not support the decision of the lower courts in any event. The interexchange facilities used by Bell Atlantic's proposed gateway service are not a "major" component of the service; they constitute *less than one percent* of the cost of providing the service. C.A. App. 354.

The United States' assertion that the interexchange facilities are "essential" to the gateway service adds nothing to the analysis. By definition, interexchange facilities are "essential" to the communication of information from one exchange area to another, just as interstate motor carriage was essential to the transportation of livestock and sugar between Louisiana and Texas in *Red Ball*. If indispensability were the test, the district court could not have ruled, as it did (*see Pet.* App. 22a), that the decree permits Bell Atlantic to provide centralized gateway-related technical assistance and administrative functions. Interexchange communication is as "essential" to the provision of those technical and administrative functions as it is to the gateway directory assistance function.

The United States' final suggestion—that use of interexchange facilities amounts to a "for hire" offering if the charge for the overall service varies with the duration of the connection—also misses the mark. A longer call incurs a higher charge because the caller receives more information. The significant fact, however, is not that Bell Atlantic's overall charge varies with duration, but that the charge does not vary with the use of interexchange facilities. C.A. App. 283. The cost of the interexchange circuits is simply overhead; no portion of the charge for gateway service varies with whether a particular call is local or long-distance.

² AT&T expressed no such concern before the district court. Although ordinarily a militant defender of the interexchange services prohibition, AT&T did not even bother to file a brief on the merits when the issue was first raised.

This argument would have great force if addressed to a court that had the responsibility for formulating original relief in this case, after the factual and legal issues raised by the pleadings had been litigated. It might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint. Here, however, *where we deal with the construction of an existing consent decree, such an argument is out of place.*

402 U.S. at 681 (footnote omitted) (emphasis added).

It is not true, as AT&T claims, that an unnatural interpretation of the decree "is essential" to prevent Bell Atlantic from "imped[ing] competition in the long distance business." AT&T Br. 2-3. In its 1983 decision, the district court found that barring the Bell companies' own use of interexchange facilities is not necessary "in order to prevent a recurrence of the alleged anticompetitive practices of AT&T," and therefore that the rationale for the interexchange prohibition is "wholly inapplicable" in these circumstances. *United States v. Western Electric Co.*, 569 F. Supp. at 1100 & n.187 (Pet. App. 49a-50a & n.187). In fact, the United States admitted below that barring Bell Atlantic's use of these facilities "could well be anticompetitive." C.A. US Br. 31 n.33.

B. Respondents' Efforts To Distinguish the 1983 Interpretation of "For Hire" Have No Basis in the Text of the Decree

As respondents acknowledge, the district court ruled in 1983 that the decree permits the regional Bell companies "to offer local telephone directory assistance on a centralized basis, across LATA boundaries." US Br. 9; see AT&T Br. 3. There is no material difference between "411" voice directory assistance and gateway directory assistance. If the interexchange restriction does not bar one, neither can it bar the other.

AT&T asserts that the 1983 ruling was not an interpretation of "for hire" but rather "a 'pragmatic' decision to *waive*" the interexchange restriction in the case of voice directory assistance. AT&T Br. 3 (emphasis added). But the district court in 1983 specifically construed "the strict terms of the decree," holding unambiguously that the long-distance component of a centralized directory assistance function "[o]bviously" is "not 'for hire'" within the "letter" of the interexchange prohibition. 569 F. Supp. at 1100 (Pet. App. 49a-51a). AT&T's groundless recharacterization of the decision betrays an inability to articulate a principled distinction between voice directory assistance and gateway directory assistance.

The United States argues that voice directory assistance, unlike gateway directory assistance, is "integral" and "incidental" to the provision of local telephone service. US Br. 11-12. The United States asserts that the gateway central processor provides more information than can be obtained from voice directory assistance and permits more "customer interact[ion]." *Id.* But the United States neglects to explain how these considerations, even if accurate, bear on whether the long-distance component is offered "for hire." The decree says nothing about "integral" or "incidental" services; it nowhere mentions "customer interaction." Even if these distinctions have some basis in regulatory policy, they are utterly without foundation in the text of the consent decree and cannot justify inconsistent interpretations of the decree.

The United States' claim that the 1983 ruling was not intended to establish "a broad rule" of interpretation (US Br. 11) is belied by the ruling itself (*see* 569 F. Supp. at 1101 n.191 (Pet. App. 52a n.191)) and is tantamount to sanctioning *ad hoc* administration of the decree. Consistent and predictable interpretation of a consent decree is an essential element of the "four corners" rule and an indispensable limitation on the exercise of Article III power. *See United States v. Atlantic Refining Co.*, 360 U.S. 19, 22 (1959). To suggest that an interpretation establishes no "rule" for the future is to

give courts free rein to administer consent decrees with an eye to policy rather than text.³

C. The Disregard of the Decree's Text Can Be Remedied Only by Plenary Review

Respondents argue that this Court should not disturb the lower courts' unlawful departure from consistent, principled decision-making because the lower courts' "pragmatism" has done no harm in this instance.

AT&T asserts that Bell Atlantic's customers can "efficiently" obtain gateway information by arranging their

³ Respondents mistakenly assert (US Br. 11; AT&T Br. 3-4 & n.4) that rulings subsequent to the 1983 decision eroded the district court's interpretation of "for hire." The United States points to a 1984 decision in which the district court held that centralized directory assistance could not be provided to customers of independent telephone companies because the service involved communications with persons who were not the Bell company's *own* customers. *United States v. Western Electric Co.*, No. 82-0192, slip op. at 6 n.9 (D.D.C. Feb. 6, 1984) (C.A. App. 39 n.9). In the gateway service at issue here, by contrast, Bell Atlantic will be communicating only with its own customers.

AT&T relies on a series of three rulings. None interpreted the "for hire" provision, and none purported to reconsider the district court's 1983 decision. The first ruling held that the Bell companies could not offer interexchange paging and cellular radio services without a waiver. *United States v. Western Electric Co.*, 578 F. Supp. 643, 644-46 (D.D.C. 1983). The common carrier services at issue there, however, were designed to transmit information of the customers' choosing, not merely (as here) communications between the Bell companies and their own customers. The second ruling allowed the Bell companies to centralize the provision of time and weather information; the court granted a waiver from the decree's interexchange restriction, instead of construing it to permit such centralization, in order to avoid setting a precedent. *United States v. Western Electric Co.*, 578 F. Supp. 658, 661 (D.D.C. 1983). The third ruling held that a Bell company could not resell long-distance "common carrier" service as part of a "package" with telephone equipment that the Bell company was permitted to sell. *United States v. Western Electric Co.*, 627 F. Supp. 1090, 1100 n.39, 1101 n.43 (D.D.C. 1986). The gateway directory service at issue here does not provide long-distance common carriage for use by the customer.

own interexchange transport through AT&T, MCI, or another long-distance carrier. AT&T Br. 4-5. But the district court found that gateway services are obtained by the customer making a local telephone call. Pet. App. 11a n.3. Bell Atlantic will be placed at a severe competitive disadvantage if its customers are required to place a toll call, while customers of competing gateways such as Prodigy and Compuserve can obtain centralized information by means of a local call. Information providers typically deliver their information to the customer's doorstep. Barring Bell Atlantic's local delivery of its information would be no less crippling than barring Dow Jones's delivery of its newspapers or NBC's delivery of its broadcast television programs.

Respondents further assert (US Br. 12 n.12; AT&T Br. 5) that the possibility of obtaining case-by-case waivers of the interexchange prohibition ameliorates the lower courts' failure to follow *Armour* and *Atlantic Refining*. Yet, only a few days ago, the United States urged the district court to "eliminat[e] the waiver process for information services." Reply of the United States in Support of Motions for Removal of the Information Services Restriction at 29 (Jan. 18, 1991). The United States explained that "the case-by-case approach to information services is itself anticompetitive. The waiver process imposes significant delay and expense upon the introduction and modification of BOC information services, and it has thus substantially frustrated the development of information services that would benefit consumers." *Id.* at 29-30.⁴ The court of appeals itself noted

⁴ The United States further explained: "To obtain a waiver, a BOC must describe its service to the Department, the Court—and its competitors. This process tends to freeze technology and to chill innovation and competitive response by the BOCs. Further, if a BOC, after obtaining a waiver, discovers a better way to provide the service or a way to provide additional related services and take advantage of scope economies, it must go back to the Department and the Court, reveal its new ideas, and wait again before it can do so. The waiver process also invites abuse from competitors seek-

that the waiver process "can be time-consuming and onerous." Pet. App. 7a. For example, AT&T says that "waivers have been granted . . . in the past" for cellular radio services. AT&T Br. 5 n.5. Bell Atlantic sought one such waiver in 1985; the district court has not yet issued a decision on the application.

* * * *

The question in this case is not merely whether the regional Bell companies are authorized under the decree to provide centralized gateway services, but whether the district court is empowered under Article III to wield free-ranging regulatory dominion over the telecommunications industry. As one former Circuit Judge recognized, the problem here is that "generalist courts are singularly ill-situated to regulate complex industries under the rubric of a solitary consent decree resolving a single (albeit important) lawsuit." *United States v. Western Electric Co.*, 846 F.2d 1422, 1435 (D.C. Cir. 1988) (Circuit Judge Starr, dissenting).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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ing to delay BOC entry. Even absent abuse, the inherent delay, like the information services restriction itself, impedes competition and hurts consumers; the only beneficiaries are existing competitors." *Id.* at 30 (citation and footnote omitted).

